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No. 91-1826

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

CATHOLIC SOCIAL SERVICES, INC., ET AL.

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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1. Respondents' discussion (Br. in Opp. 13-22) of the first question presented—whether the court of appeals properly held that it had jurisdiction over respondents' claims—does not suggest that the decision below can be reconciled with the D.C. Circuit's decision in *Ayuda, Inc.* v. *Thornburgh*, 948 F.2d 742 (1991), reh'g denied, 958 F.2d 1089 (1992), petition for cert. pending, No. 91-1924. Instead, respondents suggest that the case is unimportant because "IRCA's legalization programs have effectively been over for nearly four years." Br. in Opp. 13. This statement

ignores the effect of respondents' own actions: although Congress intended for the program to conclude more than four years ago, this case, if not reviewed by this Court, will result in the courts' requiring the government to consider late applications from a still-burgeoning class of more than 300,000 people, see Pet. 21 n.23. Respondents acknowledge the importance of the program, which they describe as "an extraordinary act of grace," resulting in "the largest legalization program in U.S. history, perhaps in world history." Br. in Opp. 2. Accordingly, the customary standards indicate that the petition should be granted.[1]

Having little to say that would justify denial of the petition, respondents instead engage in a lengthy presentation attempting to demonstrate that *Ayuda* is wrong and that the decision of the court of appeals is correct.[2] The opposite is true.[3]

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[1] Respondents note (Br. in Opp. 8 n.5) that INS at one point expressed the view that jurisdiction was proper after this Court's decision in *McNary*. They do not, however (and could not), suggest that the jurisdictional question is not properly before the Court. As respondents admit in the same footnote, the government reasserted its jurisdictional challenge before the court of appeals took the case under submission. Furthermore, the court of appeals actually decided the question, which was necessary to its decision granting relief against petitioners. Accordingly, the question is properly before this Court. See 28 U.S.C. 1254(1) (granting unrestricted jurisdiction over "[c]ases in the courts of appeals"); *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749, 2761 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue.").

[2] See Br. in Opp. 15 (arguing that the D.C. Circuit "simply concluded that this Court did not mean what it had plainly said"). Respondents' claim that the D.C. Circuit "ma[de] no attempt to explain" its holding is difficult to credit, in light of the lengthy discussion of the issue by the D.C. Circuit, which fills 30 pages in the appendix to the pending petition in that case, No. 91-1924. See 91-1924 Pet. App. 4a-34a. If any court is to be criticized for summary treatment of the issue, it is the court of appeals in this case, whose analysis by comparison can charitably be characterized as cursory. See Pet. App. 10a-15a.

[3] Respondents suggest (Br. in Opp. 12 n.9) that we "seriously misstat[e] the nature and effect of the district court orders." We strenuously disagree. They claim that it is untrue that the "order

a. Respondents claim that *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), strictly limited the effect of Section 1160 (and its counterpart, Section 1255a, which is involved in this case) to "review of denials of individual . . . applications." Br. in Opp. 14-15.[4] This is incorrect. Rather, the Court distinguished between two types of claims —"direct review of individual denials of * * * status * * * [and] general collateral challenges to unconstitutional practices and policies used by the agencies in processing applications," 111 S. Ct. at 896, in reaching its conclusion that IRCA did not preclude collateral challenges to the unconstitutionality of INS

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effectively bars INS from deporting any individual who submits to INS an application contending he is entitled to relief," Pet. 7 n.7, based on the government's preliminary determinations that many of the 300,000 applications received to date are plainly inadequate or fraudulent, and based on the government's refusal to agree that those applications are adequate to allow the applicants the benefits of class membership. Contrary to respondents' statements, however, respondents' counsel has made it clear that the government's refusal to agree that those applications are adequate has not ended the dispute regarding the entitlement of those persons to relief. See Letter from Peter A. Schey to Department of Justice (Mar. 4, 1992) (arguing "that all [purported] class members will have to be re-interviewed" if respondents prevail in the Supreme Court). [A copy of this letter has been lodged with the Court.]

Moreover, it is respondents who seriously misstate the record when they claim "INS has agreed" that "at least half" of the "[o]ver 300,000 putative class members * * * are prima facie eligible for legalization; so, they have temporary work/stay documents." Br. in Opp. 3. As of June 5, 1992, INS has found only 79,296 applications, far less than half, sufficiently satisfactory to justify the issuance of temporary work authorizations.

[4] We are puzzled by respondents' suggestion (Br. in Opp. 9; see *id.* at 14-15) that our current construction of the two preclusion provisions is contrary to our earlier view that the provisions should be construed identically. Nothing in our petition suggests that there is a substantive difference between the effect of the provision at issue in *McNary* and the effect of the provision at issue in this case. We believe, however, that the cases should be decided differently because respondents' claims, for the reasons set forth in our petition, differ significantly from the claims at issue in *McNary*.

procedures. This case instead involves a collateral challenge to the standards governing eligibility for relief. *McNary* is therefore not squarely on point and, as we explain in the petition (Pet. 11-14), application of the factors relied upon in *McNary* demonstrates that the Ninth Circuit erred: respondents' claims would "have the effect of establishing [respondents'] entitlement to [relief]," *McNary*, 111 S. Ct. at 898; they would be subject to meaningful judicial review under IRCA; and the administrative record would provide an adequate basis for judicial review.

b. Respondents dispute these points, first claiming (Br. in Opp. 16-19) that respondents have no opportunity for meaningful judicial review. But their basic argument is not the argument this Court accepted in *McNary*—that the *McNary* claimants suffered irreparable injury because the nature of the administrative process made it impossible for them to present a record for their claim in a way that would enable courts to evaluate the claim, see 111 S. Ct. at 896-897—but the very different claim that the procedures established by Congress are simply too time-consuming and burdensome to be pursued by an alien who has a different view of the substantive requirements for relief than the agency charged with administering the statute. See Br. in Opp. 17-18. That claim, if accepted as a basis for judicial review, would justify initial district court review not only in this case, but even in individual cases challenging INS's determinations. If the statute has made anything clear, it is that individual claimants, even if they disagree with INS's understanding of the statute, cannot secure judicial review of their claim for relief until they go through the entire process outlined on pages 17-19 of the Brief in Opposition. Logical reasoning cannot support a different result for this case, which presents a group of similarly situated aliens with a common disagreement regarding the merits of their applications.

Respondents cannot suggest a single way in which the procedures mandated by Congress for review of determinations regarding applications are inadequate to review

INS's determination regarding the substantive standards required for relief. Because the claims present nothing more than a question regarding application of the language of the statute to the facts of an individual application, and because the facts of the application will be contained in the administrative record, the statutory procedures offer every opportunity for production of an adequate record. Compare *McNary*, 111 S. Ct. at 896-897 (discussing impossible position of *McNary* plaintiffs attempting to make an administrative record to support their claims).[5]

The principal argument respondents make in support of the claim that Congress failed to provide for meaningful judicial review is their claim that review will not necessarily follow promptly. They claim INS will not be able to institute deportation proceedings against all aliens denied legalization, because the "keen evasion skills" of the aliens will prevent INS from locating them. Br. in Opp. 17 n.13. Aliens readily can obtain review, however, by voluntarily notifying INS of their whereabouts. That the statute requires an alien to choose between prompt judicial review in deportation proceedings and continued evasion of lawful process hardly suggests that the review provided is inadequate. Aliens who reside in the United States in violation of the law,[6] and who avoid deportation proceedings through the exercise of "keen evasion skills" should not be heard to complain about Congress's decision

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[5] The *McNary* Court also pointed out that the "abuse-of-discretion" standard of review provided for by Section 1255a was inappropriate for the constitutional claims at issue in *McNary*. See 111 S. Ct. at 897. This problem does not arise in this case, because respondents' claims raise an issue of law regarding interpretation of IRCA. Accordingly, they are not subject to the abuse-of-discretion standard. See Section 1255a(f)(4)(B) (requiring the "abuse-of-discretion" standard only for "the findings of fact and determinations contained in [the administrative] record").

[6] As we mentioned in the petition (Pet. 2), the only aliens who were eligible for relief under IRCA were aliens who were not lawfully in this country. Accordingly, aliens properly seeking relief under IRCA by definition are not lawfully in this country.

not to adopt a scheme that permitted them to obtain judicial review of their claims while they remained in hiding. Cf. *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970) (status as a fugitive "disentitles [the fugitive] to call upon the resources of the Court for determination of his claims"). Respondents' desire to avoid this choice by filing a class action cannot excuse their failure to pursue the remedies offered by Congress.

c. Third, respondents claim (Br. in Opp. 19-20) that the relief granted in these cases did not amount to legalization. That claim ignores reality. Both respondent classes effectively are limited to individuals who would have gained relief but for INS's challenged interpretations of IRCA. See Pet. 12 n.14 (quoting class definitions). Because the court of appeals has ordered INS to evaluate applications from class members without regard to the identified defects in their applications for adjustment, the inevitable effect of the relief will be to require INS to grant legalization to the actual class members.[7]

d. Finally, respondents claim (Br. in Opp. 21-22) that this action is no different from the collateral federal court challenges to deportation proceedings that have been permitted outside the deportation review procedures established in 8 U.S.C. 1105a. As we discuss in the petition (Pet. 14 n.17), we agree that Section 1105a is relevant, because it would be odd to conclude that exhaustion is not required under Section 1255a—with its express preclusion of alternate forms of judicial review—in circumstances where Section 1105a itself has been held to require exhaustion. Respondents, however, suggest that the cases

[7] Respondents' reliance (Br. in Opp. 20) on *United Automobile Workers* v. *Brock*, 477 U.S. 274 (1986), is misplaced. That case involved claimants challenging the implementing agency's interpretation of a federal statute in circumstances where, unless the claimants could proceed in federal court without exhausting their administrative remedies, review of the administrative actions would occur in state courts. See 477 U.S. at 285. Because IRCA provides for federal-court review, albeit after exhaustion of the administrative process, *Brock* is inapposite.

interpreting Section 1105a support their position, arguing that courts regularly "permit independent district court review of legal challenges to INS regulations and policies, even when application of those policies could ultimately result in a deportation order." Br. in Opp. 21. Although this state-ment may be literally true, it is not helpful to respondents' position. Whatever the merits of the cases they cite (Br. in Opp. 21 n.23), all of them—like *McNary*—in fact involve challenges to allegedly improper procedures; none involves a claim that the agency improperly interpreted the substantive requirements for relief.[8] Accordingly, these cases cannot support respondents' attempt to extend *McNary* to that context.

2. On the second question presented, respondents do not suggest that the issue is unimportant, but instead attempt (Br. in Opp. 22-23) to defend the court of appeals' suggestion that *INS* v. *Pangilinan*, 486 U.S. 875 (1988), should be limited strictly to cases in which the court's order directly requires naturalization. As we explained in

[8] See *INS* v. *National Center for Immigrants' Rights, Inc.*, 112 S. Ct. 551, 553 (1991) (allegedly improper condition on bonds); *El Rescate Legal Services, Inc.* v. *Executive Office of Immigration Review*, 959 F.2d 742, 745 (9th Cir. 1992) (alleged violations of requirement to translate immigration proceedings); *Campos* v. *Nail*, 940 F.2d 495, 496 (9th Cir. 1991) (allegedly improper refusal to transfer venue); *Montes* v. *Thornburgh*, 919 F.2d 531, 533 (9th Cir. 1990) (allegedly improper requirement of detailed factual submissions by applicants for relief); *Salehi* v. *District Director*, 796 F.2d 1286, 1291 (10th Cir. 1986) (failure to hold hearings on motion to reopen); *Jean* v. *Nelson*, 727 F.2d 957, 961 (11th Cir. 1984) (en banc) (challenge to procedures for unadmitted aliens), aff'd on other grounds, 472 U.S. 846 (1985); *Haitian Refugee Center* v. *Smith*, 676 F.2d 1023, 1026 (5th Cir. 1982) (challenge to expedited procedures); *Hotel & Restaurant Employees Union, Local 25* v. *Smith*, 563 F. Supp. 157, 159 (D.D.C. 1983) (allegedly improper reliance on routine State Department recommendations against granting relief for Salvadorans); *Orantez-Hernandez* v. *Smith*, 541 F. Supp. 351, 354 (C.D. Cal. 1982) (challenge to various procedures allegedly used with respect to Salvadoran nationals). The final case cited by respondents, *Abdelhamid* v. *Ilchert*, 774 F.2d 1447, 1450 (9th Cir. 1985), is not apparently relevant. It does not involve deportation and the court of appeals ordered dismissal for want of jurisdiction.

the petition (Pet. 18), that argument eviscerates *Pangilinan*, because it would allow any court to reach the same substantive result simply by recrafting the terms of its order so that they would not directly require naturalization. Nothing in this Court's analysis suggests that it is permissible for federal courts to contravene statutory deadlines so readily.

Respondents also argue (Br. in Opp. 23-26) that the court of appeals' decision is nothing more than a commonplace application of the doctrine of equitable tolling discussed in *Bowen* v. *City of New York*, 476 U.S. 467 (1986), and *Irwin* v. *Veterans Administration*, 111 S. Ct. 453 (1990). There are several significant problems with this argument. First, and most importantly, the argument assumes that the timeliness requirement is a statute of limitations. That is not correct. As the structure of the statute makes clear, the timeliness requirement is one of the four substantive requirements for relief, set forth in the four paragraphs of Section 1255a(a). Because Congress intended to create a program of limited duration, it provided that the class of eligible aliens would include only aliens who sought relief within the designated twelve-month period.[9] The court of appeals erred in assuming the power to ignore this requirement.[10]

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[9] Congress's intent to provide a program of a strictly limited duration is made especially clear by the express preclusion of any judicial review for any denial "based on a late filing of an application." Section 1255a(f)(2). This clear bar on extensions of the deadline completely differentiates this case from *Bowen* v. *City of New York*, 476 U.S. 467 (1986). As the Court noted, the statute at issue in *Bowen* expressly authorized tolling of the filing requirement by the Secretary. See *id.* at 480. Moreover, as the Court subsequently has noted, *Bowen* turned on the fact that the challenged policy was "a secret, internal policy," rather than a published regulation. See *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 123 (1988). Because the respondent classes by definition include only people who knew about the policy (see Pet. App. 25a-26a; Pet. 6), *Bowen* is inapplicable.

[10] See *Schweiker* v. *Hansen*, 450 U.S. 785, 790 (1981) (summarily reversing a court of appeals decision waiving an application requirement based on allegations that the claimant failed to file based on the agency's advice that the claimant was ineligible for relief; explaining that "[a] court is no more authorized to overlook the valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits").

In any event, the facts of this case are plainly inadequate to support equitable tolling. As the Court explained in *Irwin*, equitable tolling typically is available when "the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period" or when "the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." 111 S. Ct. at 458. Respondents plainly did not "actively pursu[e] [their] remedies"; their failure to file timely applications is the cause of the dispute. Nor is it fair to say that they were somehow tricked into not filing by the government's misconduct. The sole government conduct at issue is the government's promulgation of its understanding of the statutory requirements, which differed from respondents' understanding. The government in no way misrepresented the date of the deadline or the requirements for filing. Rather, it simply advised respondents that it believed they would not be entitled to relief even if they did file. The clear inadequacy of this as a basis for equitable tolling is evident from the consequences of respondents' argument; if a party's expression of its belief that it would prevail in litigation were sufficient to toll a statute of limitations, there would never be a bar of limitations in any case in which the defendant disclaimed liability. Accordingly, there is no basis for application of the doctrine of equitable tolling in this context.[11]

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[11] Based on legislative history acknowledging the "liberal and generous" nature of IRCA, respondents argue that the Court, whenever it interprets IRCA, should resolve "any doubts * * * in favor of an interpretation maximizing the number of eligible aliens whose status is thereby regularized." Br. in Opp. 4; *id.* at 25 ("purpose [of IRCA] is to maximize the number of legalizable aliens"). We disagree. To be sure, the legislative history strongly suggests that Congress in some respects desired a liberal and generous interpretation of IRCA. The

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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statute, as enacted, however, represents a compromise between competing principles. Thus, courts must give effect to the language of the entire statute, even when that language limits the generosity evidenced by IRCA as a whole. As this Court has put it:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez v. *United States*, 480 U.S. 522, 525-526 (1987). This is particularly true in a case like this one, where the competing purpose —a desire to place firm temporal limitations on the program—is clear from the face of the statute. See *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) ("[T]he plea of limitations [is] a meritorious defense, in itself serving a public interest." (internal quotation marks omitted)).